United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig + affidavit
+ mailing

76-1562

On Submission

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1562

UNITED STATES OF AMERICA,

Appellee,

—against—

PRASARN BHONGSUPATANA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Prasarn Bhongsupatana appeals *pro se* from a judgment of conviction of the United States District Court for the Eastern District of New York (Weinstein, *J.*), entered November 12, 1976, which judgment convicted the appellant after a jury trial of importing approximately 6.1 kilograms of heroin into the United States from Bangkok, Thailand in violation of Title 21, United States Code, Section 952 (Count One) and of possessing with intent to distribute a quantity of heroin in violation of Title 21, United States Code, Section 841(a)(1) (Count Two). Appellant was sentenced to ten years imprisonment, and a special parole term of five years and $10,000 fine on both counts, to run concurrently. He is currently serving his sentence.

Appellant, as best as we understand his *pro se* papers, raises essentially three issues on this appeal: (1) inadequate representation by counsel; (2) a claimed defect with respect to the transcript of the trial, and (3) errors in the court's instructions.[1]

Statement of Facts

A. The Government's Case

Through the testimony of Customs Inspector Cosmo John Lava, it was established that the vessel, the American Lancer docked at Holland Hook Port in Staten Island on September 6, 1976 containing on board a shipment from Bangkok, Thailand consisting of five pieces—a Thai spirit house, a pedestal and base for the spirit house, a xylophone and a wooden canoe. (26-26).[2] The crates in which the items were contained bore the name "MaChin" and the address 122 North 6th Street, Brooklyn, New York. A customs search of the shipment conducted the following day revealed the presence of heroin in the pedestal. On September 17, 1976, Customs Inspectors conducted a thorough search of the shipment and extracted over fourteen pounds of heroin from two tin canisters inside the body of the pedestal (18; 22; 30-32). A small portion of heroin was left inside the pedestal and the pedestal was resealed to await the arrival of its claimant. The wholesale value of the seized heroin was in excess of one million dollars (83).

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[1] In his original *pro se* brief, appellant claimed he had been denied due process due to the failure to provide him with a copy of the transcript. This has now been provided to appellant (Item No. 26, Record on Appeal). Hence, this point is now moot.

[2] Numbered references are to pages of the trial transcript.

On September 10, 1976, the appellant Prasarn Bhongsupatana arrived in New York from Bangkok, Thailand (134). In the appellant's visa application dated September 1, 1976,[3] he stated that the purpose of his trip to the United States was to attend a business seminar; that Electronic Aids, Inc. was paying for his trip and that he had never before applied for a visa to the United States (127-128). Accompanying the visa application were two letters. The first letter was addressed to the American Embassy in Bangkok, Thailand from the Vanich Siam Company in which that company stated that Prasarn Bhongsupatana was their assistant manager and that he had been invited to attend a seminar of Electronics Aid, Inc. from September 7, 1976 through September 21, 1976 (128). The second letter purported to be a letter from Electronics Aid, Inc. to the Vanich Siam Company which letter stated that Prasarn Bhongsupatana had been invited by Electronics Aid, Inc. to attend a seminar in September 1976 (129). Richard Stowe, Vice-president of Mycom Media, and formerly an employee of Electronics Aid, Inc. testified that Electronics Aid, Inc. had ceased to exist as a corporate entity in 1972, that Mycom Media Corporation was the successor company, that no seminars were being conducted by Mycom Media in 1976, and that the defendant Prasan Bhongsupatana had never been invited to attend any seminars conducted by his company (131-132).

Mr. Louis DeMarco, a customs broker, testified that on the 23rd of September 1976, Bhongsupatana came to his offices at the World Trade Center, identified himself as a Mr. Wimana and presented DeMarco with a Bill of lading for the pedestal and other items comprising the shipment (46). According to the Bill of Lading, the

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[3] Government's Exhibit 14 in Evidence.

shipment was consigned to a Mr. A. Wimana, 601 W. 110th Street, New York, New York (41). The appellant asked DeMarco to arrange for the delivery of the goods to his sister's house at 105-11 220th Street, Queens Village, paid DeMarco three hundred and twenty dollars in cash to cover the costs of the delivery and signed a power of attorney in the name Aswin Wimana (47-49). The following day the appellant called Louis DeMarco and requested that the shipment be delivered as soon as possible (49). DeMarco advised that delivery would cost an additional one hundred and twenty-five dollars. On the morning of September 26, 1976, the appellant came to Mr. DeMarco's Office with the additional one hundred and twenty-five dollars (50). On September 27, 1976, Mr. DeMarco, after making inquiries about the shipment, was contacted by Agents of the Drug Enforcement Administration (50). The appellant called Mr. DeMarco on Thursday, September 30, 1976 and arranged for delivery of the shipment for Friday, October 1, 1976 between 11:00 a.m. and 11:30 a.m. (51-52).

On the 1st of October, the delivery date, John Taylor and James Kibble agents of the Drug Enforcement Administration posing as truck drivers picked up the shipment and transported it to 105-11 220th Street in Queens, New York arriving at approximately 11:45 a.m. (60-61). Prior to their arrival, the appellant had called Louis DeMarco to inquire of the whereabouts of the truckmen stating that he was anxious to receive the shipment (52).

Shortly, after the agents arrived at the address, Agent Taylor observed Bhongsupatana waving and walking hurriedly towards them. Agent Taylor described the defendant as very agitated and noted that his hands were shaking (62). The appellant stated that he was Mr. Wimana, accepted delivery of the shipment and paid the agents an additional twenty dollars to unload the items

into the garage of the residence at 105-11 220th Street (62). While they were unloading the items from the truck, the appellant climbed up on the truck and inspected the pedestal (64). He then requested that the agents leave the other items there and take the pedestal to 601 West 110th Street in Manhattan. Bhongsupatana gave the agents an additional twenty dollars for the delivery and agreed to meet the agents at that address in Manhattan and accept delivery of the pedestal (67).

The appellant was observed by Special Agent DeWitt Rabb leaving the vicinity of 105-11th Street at approximately 1:30 p.m. (97). Agent Rabb followed the appellant to the Jamaica Avenue, Queens, subway station and into the subway train to Manhattan. For approximately an hour, Agent Rabb followed the appellant closely. After a series of furtive movements on and off trains going in opposite directions, appellant finally succeeded in evading Agent Rabb's surveillance (98-105). After losing sight of the appellant, Agent Rabb proceeded by subway to 110th Street and Broadway. When Rabb exited the subway station at approximately 2:30 p.m., he observed Bhongsupatana at the top of the subway stairs (104).

According to the appellant's instructions, Agent Taylor and Kibble delivered the pedestal to the front entrance of an apartment building at 601 West 110th Street in Manhattan. At approximately 2:30 p.m., Agent Taylor observed the appellant in the vicinity. Moments thereafter, the manager of 601 West 110th Street came out of the building and advised that there was a call in the lobby of the building for the truck driver. Agent Taylor answered the phone and spoke to the appellant who advised Taylor that he had been in an automobile accident in the Bronx and would be unable to come and sign for the pedestal (72). He asked Agent Taylor to leave the pedestal in the front of the building (73). At the time of this con-

versation, Agent Coleman observed the defendant on the telephone in a telephone booth around the corner from 601 West 110th Street (115).

Agents Taylor and Kibble unloaded the pedestal in front of the building, drove the truck away and joined other Drug Enforcement Agents conducting surveillance in the vicinity (75).

For the next two hours, surveillance agents observed Bhongsupatana walking around in the vicinity of the apartment building, placing numerous phone calls and constantly eyeing the pedestal (70-81).

At approximately 5:00 p.m., Agents Taylor and Kibble returned in the truck to the front of 601 West 110th Street. Appellant placed a second call to Agent Taylor in the lobby of the apartment building (80). After being advised of the call and prior to answering the telephone, Agent Taylor observed the appellant across the street from the apartment building in a telephone booth. Bhongsupatana continued to claim that he was in the Bronx and asked that the agents take the pedestal back to the warehouse. He told them he would pick it up the next day (80-81).

Shortly thereafter, the defendant was placed under arrest at a bus stop a block away from the apartment building (120).

B. The Defense

Bhongsupatana testified in his own behalf that his purpose for coming to the United States in September, 1976 was in connection with the advancement of his family's fanbelt business (142). According to Bhongsupantana, he was here to contact American companies

which produced fanbelts concerning importing these products into Thailand (181). He admitted, however, that he had not written to any such companies before leaving Thailand nor had he in the three weeks he was in the United States prior to his arrest visited any such companies (182; 181-185).

In explanation for the false statements in his visa application, Bhongsupatana stated simply that he signed a blank application and gave it to a man named "Richard", who was in the business of obtaining visas. He was unaware of a last name for this "Richard" (144-145; 175).

Appellant claimed that the predicament of his arrest came as a result of his willingness to help a friend. According to Bhongsupatana, shortly before he came to the United States, an individual whose first name was Lersak, whom he had known for seven years, but whose last name he did not remember, asked appellant to pick up a shipment in the United States and keep it in his apartment until he was contacted by a Mr. MaChin, also known as Mr. Lee (146-148; 170-171; 193; 221-222). This MaChin was supposedly not able to pick up the goods himself because he was in Europe at the time (170). Mr. Lersak gave the defendant no description of this MaChin nor any number or address where MaChin could be reached in the United States (194-195).

Bhongsupatana testified initially that Mr. Lersak gave him the Bill of Lading for the goods which he did not look at until two days later and that he did not see Lersak again after their initial meeting (191). When asked to explain the fact that the goods were assigned to "A. Wimana" at 601 West 110th Street, New York, New York, appellant suddenly recalled that he had looked at the Bill of Lading and that he had told Lersak that the

consignment should be changed to his friend's name, "Wimana," in the event that he could not pick up the goods (193). Lersak said nothing to the appellant about the value of the goods nor told him to take any special care with them (222-223). Lersak gave the appellant five hundred dollars to cover the expenses of picking up the goods (145-146).

After appellant arrived in the United States, he contacted his friend Suchod Periwong to assist him in the details of picking up the shipment. Periwong directed him to customs broker, Louis DeMarco, whom he went to see at DeMarco's office in the World Trade Center (148-149). In direct contradiction to the testimony of Louis DeMarco, Bhongsupatana testified that when he presented DeMarco with the Bill of Lading, he did not tell DeMarco he was "Wimana", that in fact he told DeMarco his true name and DeMarco told him to sign the name "Wimana" (149).

On the day the shipment was delivered by the agents to the house of Bhongsupatana's friend Renu Parnarom at 105-11 220th Street in Queens, New York, the appellant denied telling the agents he was "A. Wimana"; in addition, the appellant claimed that during the unloading of the items from the truck he noticed that the pedestal was broken and asked the truck drivers to take it back to the warehouse (158; 207-208). The appellant conceded that he did not complain that the spirit house was also broken. Appellant further contended that it was the agent's idea, and not his to transport the pedestal to 601 West 110th Street.

The appellant denied seeing Agent Rabb on his subway trip to Manhattan to meet the truck drivers (162; 210); he admitted placing a call to the truck drivers at

the desk of 601 West 110th Street but, in contradiction to the testimony of Agents Taylor and Coleman, he stated that was not a block away from the building but rather in the subway station at the time he made the call (161; 213-214). He further denied telling Agent Taylor that he was in car accident in the Bronx (212-213).

Bhongsupatana stated in contradiction to the surveillance testimony that he did not arrive at 601 West 110th Street until after the truck had departed and the pedestal had been placed in front of the building (163; 218). Appellant admitted some of his movements around the neighborhood but insisted that he was only engaged in such innocent activity as eating lunch, getting a haircut and calling friends. He denied paying any particular attention to the pedestal (166-168; 215-218).

ARGUMENT

POINT I

Appellant Was Adequately Represented by Counsel.

Appellant claims that his attorney inadequately represented him because, allegedly, he only visited him on three occasions and then for a very brief period. It is also claimed that he refused to discuss possible defense witnesses located in Thailand. We contend that it does his counsel, John C. Corbett, an injustice to characterize his conduct as incompetent and his representation could hardly be called a "farce and mockery of justice"; the standard to be applied in challenges of this sort. *Rickenbacker* v. *Warden*, Dkt. No. 76-2036, Slip op. 1063 (2d Cir., December 22, 1976). But indeed, on any standard, counsel's representation was, we submit, adequate. *Cf.*

United States v. *Taylor*, Dkt. No. 76-1210, Slip op. 2805, 2829 (2d Cir., April 13, 1977).[4]

The bare claim that counsel failed to spend enough time prior to trial with the appellant is not enough to call into question the competency of the representation. As was said by this Court recently in *Wojtowicz* v. *United States*, Dkt. No. 76-2106, Slip op. 1905, 1917 (2d Cir., February 22, 1977): "In evaluating claims of ineffective assistance of counsel it has long been the rule that 'time consumed in oral discussion and legal research is not the crucial test . . . The proof of the efficiency of such assistance lies in the character of the resultant proceedings' ". In the present case, appellant's counsel thoroughly cross-examined the Government witnesses and gave a summation that forcefully set forth a defense. The record shows that the defense was well within the " 'range of competence demanded of attorneys in criminal cases' " (*Ibid*; citations omitted).

Concerning the alleged failure of counsel to obtain witnesses from Thailand, we initially note that this involves the area of trial strategy which cannot be grounds for a showing of inadequacy of counsel. *United States* v. *Yanishefsky*, 500 F.2d 1327, 1331-32 (2d Cir. 1974). But, as the record conclusively demonstrates, the guilt of appellant was overwhelming. He testified to a tale completely at odds with the testimony of all the surveillance agents; testimony, of course, that could not be rebutted by witnesses in a foreign country. Obviously, under these circumstances, counsel's course of defense cannot be so inadequate as to constitute a denial of the Sixth Amendment right to the effective assistance of counsel.

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[4] We, of course, do no mean to suggest that the applicable standard is, or should be, any other than the "farce and mockery of justice" test. See, *United States* v. *Taylor*, *supra* at pp. 2842-2843 (concurring opinion per. Timbers, *J.*).

POINT II

The Procedures Followed In Filing The Corrected Transcript Were Proper.

Appellant contends that there is now "no true verbatim copy of a transcript in existence." (Appellant's Brief, p. 5). Essentially, it seems his argument is that since the procedures followed by the Government and his defense lawyer were, according to appellant, improper, there cannot now be a transcript in existence. This is, of course, frivolous.

As set forth in our affidavit, filed with this Court on April 4, 1977, the original transcript was poorly transcribed and a corrected copy was deemed necessary. Thereafter, the corrections were agreed to by both counsel and, in addition, corrections were made by Judge Weinstein of the charge. A stipulation then was entered into "that the corrected transcript filed [April 8, 1977] in the United States District Court for the Eastern District of New York is a true and accurate transcript of the proceedings in [this case]" (Item No. 25, Supplemental Index to Record on Appeal). This procedure was in accordance with Rule 10(e), Fed.R. Appellate P., 9 Moore's Federal Practice, ¶ 210.09. Accordingly, there was no error and the Corrected Transcript transmitted to this Court by the Clerk of the Court, United States District Court for the Eastern District of New York is a verbatim transcript. To contend otherwise is frivolous.

POINT III

There Was No Error In The Court's Charge To The Jury.

Appellant argues that the district court erred in its instructions to the jury. He raises two claims: *first*, that by giving a conscious avoidance charge (266-267), the

court incorrectly instructed the jury on knowledge and intent; and *second*, that it was wrong for the jury to be charged on aiding and abetting (267-268). Both contentions are totally without merit.

Judge Weinstein's conscious avoidance charge (266-267) is almost identical in its language to instructions previously upheld by this Court in *United States* v. *Joly*, 493 F.2d 672, 674 (2d Cir. 1974). See also, *United States* v. *Brawer*, 482 F.2d 117, 128 n.14 (2d Cir. 1973), *cert. denied*, 419 U.S. 1051 (1974). In addition, as Judge Weinstein observed (266), the crucial issue in this case was whether appellant knew the pedestal contained heroin. The evidence adduced at trial, including appellant's incredible testimony, fully supported the giving of the conscious avoidance instruction. *Cf. United States* v. *Joly*, *supra*.

Appellant's claim that it was improper to charge the jury on aiding and abetting is based on the contention that no one was convicted as a principal in the heroin smuggling scheme. The argument is fallacious. In the first place, it is not a prerequisite to the conviction of an aider and abettor that the principal be tried or convicted, or even indicted. *United States* v. *Bryan*, 483 F.2d 88 (3d Cir. 1973). It is only necessary that there be a principal and that a crime be committed. *United States* v. *Austin*, 462 F.2d 724 (10th Cir.), *cert. denied*, 409 U.S. 1048 (1972); *Feldstein* v. *United States*, 429 F.2d 1092 (9th Cir.), *cert. denied*, 400 U.S. 920 (1970). Clearly, both of these requirements were met here. Furthermore, as this Court has pointed out, "18 U.S.C. § 2 does not define a crime; rather it makes punishable as a principal one who aids or abets the commission of a substantive crime." *United States* v. *Campbell*, 426 F.2d 547, 553 (2d Cir. 1970). Here, if, indeed, he was not guilty as the principal, appellant, at the very least, clearly aided and abetted the smuggling of the heroin.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
June 6, 1977.

Respectfully submitted,

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on the 9th day of June 19 77 he served a copy of the within

BRIEF FOR APPELLEE

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gs, City of New York.

Dolores M Byrd

to before me this
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9 day of June 19 77

Barbara A Allen

BARBARA A. ALLEN
tary Public, State of New York
No. 24-4646824
Qualified In Kings County
mmission Expires March 30, 1979